Supreme Court, U.S.
FILED
DEC 29 2006
OFFICE OF THE CLERK

No. 06-933

In the Supreme Court of the United States

JERRY WAYNE LYNCH, et al.,
Petitioners,

v.

CITY OF JELLICO, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioners unsuccessfully challenged in State court the constitutionality of a number of changes made to the Tennessee Workers Compensation Act as amended by the Tennessee Workers' Compensation Reform Act of 2004. Petitioners asserted that changes to the existing Act that reduced the so-called multipliers violated due process and equal protection. Petitioners asserted as well that the institution of a required Benefits Review Conference Requirement was violative of due process. Finally, petitioners asserted that the use of AMA Guides to determine anatomical disability constitutes unconstitutional discrimination.

The questions presented are as follows:

1. Did the Tennessee Supreme Court err in failing to find that the multipliers as altered by the Tennessee Workers' Compensation Reform Act of 2004 violate both equal protection and due process?

2. Did the Tennessee Supreme Court err in failing to find that the addition of the Benefits Review Conference Requirement denied due process of law?

3. Did the Tennessee Supreme Court err in failing to find that the use of AMA Guides to determine anatomical disability was unconstitutionally discriminatory?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: Jerry Wayne Lynch and David A. Lozano.

Respondents: The State of Tennessee; Paul G. Summers, Attorney General of the State of Tennessee; the City of Jellico, Tennessee; Lincoln Memorial University; and St. Paul Travelers Insurance Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jerry Wayne Lynch ("Mr. Lynch") and David A. Lozano ("Mr. Lozano") respectfully petition for a writ of certiorari to review the specified judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The Claiborne County (Tennessee) Chancery Court entered an Order in the case of Mr. Lozano on January 19, 2006 (Appendix ["App."] E, *infra*,). The Campbell County (Tennessee) Chancery Court entered an Order in the case of Mr. Lynch on January 20, 2006 (App. D, *infra*). The Chancery Courts granted in each case a partial summary judgment finding various provisions of the Tennessee Workers' Compensation Reform Act of 2004 to be unconstitutional. The two Chancery Court judgments were reversed on direct appeal by the Tennessee Supreme Court in a Judgment filed on August 30, 2006 (App. B., *infra*), and an Opinion filed on August 30, 2006 (App. C, *infra*). A Petition for Rehearing filed by Messrs. Lynch and Lozano was denied by the Tennessee Supreme Court in an Order filed on October 10, 2006 (App. A, *infra*).

JURISDICTION

The denial by the Tennessee Supreme Court of a Petition for Rehearing was filed on October 10, 2006. This petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§ 1257(a), 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V, PROVIDES IN PERTINENT PART:

> No person shall be ... deprived of life, liberty, or property, without due process of law[.].

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, PROVIDES IN PERTINENT PART:

> Section 1. ... No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT PORTIONS OF THE TENNESSEE WORKERS' COMPENSATION REFORM ACT OF 2004, TENN. CODE ANN. §§ 50-6-203(a), 50-6-225(a)(1), 50-6-239(b), 50-6-241(d)(1)(A) ARE INCLUDED IN APP. F, infra.

STATEMENT OF THE CASE

This Petition seeks a review of findings by the Tennessee Supreme Court upholding the constitutionality of that State's present version of its workers' compensation legislation. Petitioners maintain that certain changes to Tennessee's workers' compensation legislation as enacted in the form of the Workers' Compensation Reform Act of 2004, far from benefitting the workers of that state, instead unconstitutionally reduced benefits to which they were entitled while at the same time unconstitutionally making it more difficult for these workers to receive compensation in the first place. The 2004 legislation accordingly violated both the Tennessee and United

States Constitutions even though the Tennessee Supreme Court found that the 2004 legislation violated neither constitution.

In petitioners' view, the 2004 legislation violates the United States Constitution in a number of respects. First, the 2004 legislation reduced the multiplier used to determine permanent partial benefits by 40%, or from 2.5 to 1.5. Petitioners assert that this reduction violates equal protection of the laws and also denies Tennessee workers due process of law. Second, the 2004 legislation introduced the concept of a Benefits Review Conference ("BRC"); furthermore, it made participation in BRCs a mandatory requirement for the receipt of compensation. This requirement violates both equal protection and due process considerations. Third, the employment under the 2004 legislation of the so-called *AMA Guides* likewise denies equal protection and violates due process. This case therefore presents a significant and widely-debated issue regarding the extent to which recent changes to the Tennessee Workers' Compensation Act comport with constitutional guarantees to Tennessee workers of equal protection of the law and due process of law. To the extent these changes are unconstitutional, thousands of Tennessee workers are unconstitutionally being denied their right to full compensation. To the extent, such changes are typical of changes in workers' compensation legislation being enacted throughout the United States, a review of these changes in this

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[1] To the extent the decision of the Tennessee Supreme Court is founded upon peculiar provisions of the Tennessee Constitution, petitioners do not, of course, seek review in this Court. At the same time, the infirmities of the 2004 Reform Act under federal constitutional principles are so pervasive that resort to the Tennessee Constitution to save the enactment from invalidation is unavailing, as the discussion below will reveal.

Court will affect the compensation rights of millions of workers in many states.

Lower Court Proceedings. The trial court found that the 2004 legislation was unconstitutional (App."E, *infra*; App. D, *infra*). These findings were reversed on direct appeal to the Tennessee Supreme Court. (App. B, *infra*; App. C, *infra*). A Petition for Rehearing was denied without comment by the Tennessee Supreme Court on October 10, 2006 (App. A, *infra*).

The specific aspects of the opinion for which review is sought will be described below as part of the overall discussion of why, in petitioners' view, the petition should be granted.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

The Court has, upon review, long found the power of the States to enact workers' compensation laws to be constitutional. *See, e.g., New York Central R.R. v. White*, 243 U.S. 188, 200-02, 37 S.Ct. 247, 61 L.Ed. 667 (1917). Needless to say, the Court has also long held that the exercise of that power must meet constitutional standards. Consequently, the Court has, throughout the life of that workers' compensation devise, often monitored the constitutional fidelity of those statutes. *See, e.g., Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 117 & n. 5, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962). The enactment under examination here, the Tennessee Workers' Compensation Reform Act of 2004, has in the guise of economic reform, unconstitutionally reduced the workers' compensation benefits to which Tennessee workers had long been entitled. In its

review of that legislation, the Tennessee Supreme Court has found that enactment to meet the standards of the Tennessee and U.S. Constitutions. Wholly apart from its fidelity to Tennessee State constitutional standards, it is clear that the Tennessee Workers' Compensation Reform Act of 2004 cannot pass federal constitutional muster. For that reason, petitioners respectfully ask the Court to grant this petition and to disapprove on federal constitutional grounds the enactment in question.

II. THE MULTIPLIERS AS ALTERED BY THE TENNESSEE WORKERS' COMPENSATION REFORM ACT OF 2004 VIOLATE BOTH EQUAL PROTECTION AND DUE PROCESS.

The root of the constitutional error committed by the Tennessee court win regard to the multiplier issue lies in its flawed conclusion, *Lynch v. City of Jellico*, Slip. Op. at 10-11, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *27 to *28, that its earlier decision in *Brown v. Campbell County Board of Education,* 915 S.W.2d 407, 414-15 (Tenn. 1995) (assuming arguendo only its fidelity to federal constitutional standards), forecloses a revisiting of the multiplier issue in light of the recent amendments to the Workers Compensation Law as embodied in the Workers Compensation Reform Act of 2004. Above all, petitioners respectfully suggest that the Tennessee Supreme Court should have reconsidered its view that "[n]othing has changed since Brown was decided in 1995, *except that the multiplier has been reduced from 2.5 to 1.5 as part of the Reform Act of 2004." Lynch v. City of Jellico*, Slip. Op. at 11, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *28 (emphasis supplied).

This proposition is legally and factually an oxymoron. The fact that the multiplier was reduced by some 40% is precisely

the point; legally, this means that in fact "*[everything] has* changed since Brown was decided in 1995." *Lynch v. City of Jellico*, Slip. Op. at 11, ___ S.W.3d at __, 2006 Tenn. Lexis 759 at *28 (emphasis suppled). Even if a 2.5 multiplier satisfied equal protectio demands in 1995, it by no means follows that a multiplier that is a mere statistical shadow of its predecessor would do likewise. For that reason alone, the Court should review the conclusion that "the rationale adopted by the Court in Brown in upholding the method of determining permanent partial benefits is just as valid today as it was when Brown was decided." *Lynch v. City of Jellico*, Slip. Op. at 11, ___ S.W.3d at __, 2006 Tenn. Lexis 759 at *29. That is, even if the concept of a multiplier of *some* size is valid in a general sense, it by no means follows that a multiplier of *any* size–particularly one of the size enacted in the Workers Compensation Reform Act of 2004–is a fortiori constitutional. In the end, the Tennessee Supreme Court found that "[a]ccordingly, the trial court in this case erred in finding that section 50-6-241(d)(1)(A) violates equal protection." *Lynch v. City of Jellico*, Slip. Op. at 11, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *29. In so concluding, the court was frankly comparing apples (in the form of the superceded 2.5 multiplier) and oranges (in the form of the 1.5 multiplier). It was, in fact, the trial court that got it right. Consequently, a review of that decision in this Court is mandated.

The possibility that a 2.5 multiplier and a 1.5 multiplier are equivalent for equal protection purposes seems counterintuitive on its face. In fact, the economic facts of life empirically underscore the flaw in that reasoning. The recent Census Report posted out that "[a]djusted for inflation, men's earnings were lower in 2005 than they were in 1973." E. J. Dionne Jr., "Perfect Storm for the Poor, *The Washington Post* p. A-21, column 4 (September 1, 2006), citing Census

Report Table A-2 at p 38). [2] Thus, not only does the 40% reduction in the multiplier serve to widen the equal protection gap but wage trends are serving to acerbate that situation all the more. In short, petitioners' equal protection rights–and those of their similarly situated fellow workers–are undeniably and unconstitutionally being impaired by this reduction in the multiplier. *See generally, Heckler v. Mathews*, 465 U.S. 728, 739-40, 104 S.Ct. 1387, 79 L. Ed. 2d 646 (1984).

Certainly, it is hornbook law that governmental actions must pass both procedural and substantive due process muster as well as equal protection scrutiny. *See, e.g., Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7-9, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). As an economic analysis of the effects of the 1.5 multiplier enacted in 2004 will reveal, the Court overlooked the due process effects of that enactment upon Tennessee workers. For this reason as well, a review of both the Workers Compensation Reform Act of 2004 and the

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[2] Mr. Dionne points out that women have done better on that score but only because of reasons that highlight rather then limit the problem:

> Among full-time, year-round workers, women earn 77 percent of what men do, compared with 57 percent in 1973. But in the most recent year, the gap closed because women lost income at a slightly slower rate than men did. Between 2004 and 2005, the earnings for those working full time year-around dropped 1.8 percent for men and 1.3 percent or women. That is not how most women imagine achieving equality.

E.J. Dionne Jr., "Perfect Storm for the Poor, *The Washington Post* p. A-21, column 4 (September 1, 2006).

Tennessee Supreme Court decision approving it in this context is warranted.

As the Court will note, the court below found that "Tennessee Code Annotated section 50-6-241(d)(1)(A) ... imposes a cap on permanent partial benefits of 1.5 times the employee's anatomical impairment rating if the employee returns to work at a greater or equal wage." *Lynch v. City of Jellico*, Slip. Op. at 3, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *5. The Tennessee Supreme Court, it is submitted, failed to consider what happens to such workers in fact when they do return to work.

In point of fact, the court's analysis ignores the so-called Work Life Expectancy ("WLE") of such workers. *See, generally,* John P. Tierney & Gwendolyn H. Holland, "What Attorneys Need to Know About Worklife Estimates," *Kan. Trial-Law. Assn Medical Legal Section* (1988); Anthony M. Gamboa, "Vocational Economic Damages, 24 *Trial* 33 (March 1988)("*Gamboa*"); Anthony M. Gamboa, Jr., John P. Tierney & Gwendolyn H. Holland, "Worklife Expectancy and Disability," 2 *J. Forensic Econ.* 29 (1989)("*Gamboa, Tierney & Holland*"). In fact, when a person with a permanent partial disability returns to work, he almost invariably suffers a significantly reduced WLE. The idea of placing a cap–let alone a 1.5 cap--and penalizing the worker in the process when he returns to the same or equal wage with a permanent partial disability impairment flies in the face of the actual lifetime loss of earning capacity such a worker will, as the evidence suggests, suffer in comparison to his nondisabled fellow worker.

Conventional wisdom, it goes without saying, holds that a personal injury claimant who has returned to work, perhaps receiving the same or greater compensation, has suffered no

lifetime loss of earning capacity. This apparently is the argument advanced –or at least represents the rationale relied on–by the Tennessee General Assembly when it reduced the multiplier from 2.5 to 1.5 in the Tennessee Workers' Compensation Reform Act of 2004.

This perception, however, can be true or false depending on the precise nature and extent of permanent work difficulties, if any, sustained by an individual claimant. By enacting a multiplier of 1.5 times the medical impairment rating, the determinative factors of loss of earning capacity and work life expectancy have fallen by the wayside. Indeed, the State court seemingly applauded that step when it approvingly noted that "T]he multiplier still reduces the possibility of similarly situated workers with like injuries and anatomical disability ratings receiving vastly different awards." *Lynch v. City of Jellico*, Slip. Op. at 11, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *28. As we will see below, however, such a step introduces into the compensation process irrationality, capriciousness and arbitrariness to an unconstitutional degree. For that reason, the Court is respectfully urged to grant review of the finding below denying "that the legislature's decision to use the multiplier model is arbitrary or conscience shocking in a constitutional sense." *Lynch v. City of Jellico*, Slip. Op. at 12, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *30.

In fact, it is the potential reduction of human capital that should be measured so that the unconstitutional dimensions of the multiplier–which finds such a measurement to be irrelevant–can be appreciated as it is applied to specific cases. Human capital represents the ability to produce labor-as-value as a worker, using his intellectual and physical attributes, performs measurably remunerative work. If the worker is a laborer, for example, his human capital may be primarily

physical. If the worker were, say, an attorney, his human capital would, on account of education, intellect, and experience, be primarily intellectual.

In the normal case, a worker's human capital will have been reduced when he meets the U.S. Census Bureau's definition of work disability. That definition contemplates a person, needless to say, who is limited in the amount or kind of work he is able to perform on account of injury or disability. Two facts are clear in government data about persons meeting the definition of work disability: (1) when working year-round, full time, such persons earn less, on the average, than their counterparts without a work disability, and (2) they typically work a shorter amount of time over their life expectancy than their counterparts without a work disability. *See Gamboa, Tierney & Holland, supra* at 31, Table 1. Hence, the workers' WLE is reduced, on the average, regardless of immediate or future return to work issues.

One may ask how does reduced work life expectancy translate into loss of earning capacity? Assume, for example, a 40-year-old male auto mechanic who sustains a soft tissue injury with permanent restrictions indicated by his treating physicians and therapists prohibiting medium to heavy lifting. He receives a medical impairment based upon the AMA Guides of a DRE Category equivalent to 8% to the body as a whole. He returns to his job after six months, earning the same amount of money, but with work limitations. Under the Tennessee Workers' Compensation Reform Act of 2004, he is limited to 1.5 times the medical impairment rating, regardless of the fact that he meets the definition of work disability. The pre-injury work life expectancy of this person, a high school graduate, is 21 years. Based on his condition, he is statistically most like a 40-year-old not severely disabled male high school graduate with a work life expectancy of 16.3

years. Because of his reduced work life expectancy, it is probable that he will sustain a lifetime loss of earning capacity of $210,000.00, based upon pre and post-injury annual compensation of $35,000.00. *See* 4 *VE Insight* 2 (Spring 2001). This lowered earnings result precisely because he is limited in the kind or amount of work he can perform, which is in turn the very definition of work disability. This is just another example as to why the adaptation of a 1.5 multiplier is arbitrary, capricious, nonsensical and not a true measure of work disability.

By way of further example, a 45-year-old male with less than eight years education would have a WFE of 16.246 years, while his disabled counterpart would have a WFE of only 3.376 years. If this same nondisabled worker had completed four years or more of college, his WFE would be 19.689 years. Were he disabled, his WFE would be only 12.187. In either case, it is easy to see that a 1.5 multiplier fails to come even remotely close to providing the working disabled person with a multiplier that adds up to equitable compensation.

In this regard, it is important to note "that persons who are occupationally disabled experience not only a reduced worklife but also a reduction in earnings even when working year-round, full-time." 1 *VE Insight* 2 (January 1998). Thus, workers in Tennessee who return to work are squeezed vocationally both in terms of their WLEs but also in the amount of money they are able to earn during the years they are employed. As one expert points out, "[t]he U.S. Department of Commerce, Bureau of the Census reports that on average, a disabled male high school graduate earns approximately $4,500 less per year than a nondisabled counterpart." *Id.*

But even this is not the end of the story. The application of a 1.5 multiplier assumes that, so long as they are employed, all disabled workers are similarly situated. This is self-evidently not the case. There will be extreme variations among workers. *See Gamboa, Tierney & Holland, supra* at 31. It may be the case that a particular worker would be suitably compensated by a 1.5 multiplier; that would, however, amount to little more than sheer luck. Given the full range of workers and their disabilities, the studies discussed above entail that a uniform multiplier cannot hope to reflect accurately the workforce to which it being applied. Extreme unfairness will result, For all of the reasons, therefore, the adoption of a 1.5 multiplier cannot be described as anything other than "arbitrary, or conscience shocking in a constitutional sense.'" *Lynch v. City of Jellico*, Slip. Op. at 12, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *30, quoting *Collins v. City of Shaker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed..2d 261 (1992). This entails that the Tennessee Supreme Court failed to apply this settled principle to this case, as well as overlooking the hard economic facts that should have mandated the application of these principles so as to affirm the trial court decision in this case. For that reason, petitioners' request for a review of that decision by way of certiorari should be granted.

III. THE TENNESSEE SUPREME COURT ERRED IN FAILING TO FIND THAT THE ADDITION OF THE BENEFITS REVIEW CONFERENCE REQUIREMENT TO TENNESSEE'S WORKERS' COMPENSATION LEGISLATION DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

Under prior law, an injured Tennessee worker, assuming he was unable to reach an understanding with his employer in

regard to benefits, had the option of filing a civil complaint to that end in chancery or circuit court. In the Workers Compensation Reform Act of 2004, the legislature added an administrative level to the process in the form of the Benefit Review Conference ("BRC"). Petitioners assert that the interjection of this level violated both procedural and substantive due process. Of course, the Tennessee Supreme Court wrongfully found that neither procedural due process *Lynch v. City of Jellico*, Slip. Op. at 6, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *16, nor substantive due process, *Lynch v. City of Jellico*, Slip. Op. at 6, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *17, was violated.

Petitioners respectfully urge the Court to see that these conclusions by the state court miss the point Messrs. Lynch and Lozano were trying to make. It is true that an injured worker can in theory gain an ultimate judicial review of his

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[3] Petitioners objected to the mandatory Benefits Review Conference ("the BRC") on separation of powers and open courts grounds. The Tennessee Supreme Court rejected their separation of powers argument on the ground that "[t]he courts will ultimately adjudicate a worker's claim if the case is not settled at the benefit review conference." *Lynch v. City of Jellico*, Slip. Op. at 8, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *19. Similarly, the Tennessee Supreme Court rejected petitioners open courts argument on the ground that "injured workers can have their rights judicially determined notwithstanding the benefit review conference." *Lynch v. City of Jellico*, Slip. Op. at 8, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *21. Both of those considerations are based on violations of the Tenn. Const. Art. II, § 2 (Separation of Powers); and *id.* Art. I, § 17 (Open Courts) provisions and so are not involved in this petition. Notwithstanding, these asserted errors in interpreting state constitutional law underscore the parallel errors made by that court in applying federal constitutional law.

claim. The need to run the BRC maze hampers the resolution of that claim, however. Indeed, it may do so in a manner fatal to the claim. That is, the two-step process enacted by the legislature not only may delay ultimate redress but also create a procedural maze that may lead the worker to lose or abandon his claim before the judicial process is even triggered. In short this preliminary way station offers the untutored worker one more chance to get it wrong. The worker may simply throw up his hands in dismay at the complicated road he is required to take before, assuming his case is contested, he can resolve the matter. If the worker makes a wrong procedural turn during the process, he may find that the courts are in fact substantively closed to him. For that reason, due process in both its manifestations is violated by the BRC requirement.

Finally, the Court rejects petitioners' assertion "that workers' compensation specialists should be licensed attorneys as a way of safeguarding the rights of workers." *Lynch v. City of Jellico*, Slip. Op. at 7 n.3, ___ S.W.3d at ___ n.3, 2006 Tenn. Lexis 759 at *17 n.3. The Court's response was that "[t]o the extent there is any merit to this argument, it should be addressed to the legislature." *Id.*, Slip. Op. at 7 n.3, ___ S.W.3d at ___ n.3, 2006 Tenn. Lexis 759 at *17 n.3.

This argument, however, does not meet the gravamen of petitioners' argument. The lack of legal training in such cases is not a technical matter that could by resolved by mere legislative amendment. It is, rather, a fundamental flaw that is of constitutional dimensions. As the Tennessee Supreme Court itself recently observed in an analogous context:

> Some constitutional violations, however, are not subject to harmless error review but require automatic

> reversal. These "structural" errors relate to defects in the "trial mechanism" and "transcend[] the criminal process." *Id.* [*Arizona v. Fulminante*, 499 U.S. 279] at 309-11 [111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)]. Structural defects affect the framework of the trial from beginning to end and are not simply errors in the trial process. *Id.* [499 U.S.] at 310 [111 S.Ct. 1246].

Cottingham v. Cottingham, 193 S.W.3d 531, 537 (Tenn. 2006). Surely, this very citation of authority from this Court in the form of *Arizona v. Fulminante*, 499 U.S. 279, 309-11, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) on this point convicts the Tennessee State opinion for which review is sought of petitioners' asserted constitutional error. The lack of legal training for workers' compensation specialists is a structural error of precisely the nature condemned in *Cottingham* on the basis of this Court's authority. The Tennessee legislature, to be sure, would be required to clean up the statute to reflect this Court's finding that this aspect of the Workers Compensation Reform Act of 2004 is unconstitutional. The notion that the lack of legal training is nothing more than a matter of legislative choice, however, is an error that the Court should remedy upon a grant of the instant petition.

IV. THE TENNESSEE SUPREME COURT ERRED IN FAILING TO FIND THAT THE USE OF *AMA GUIDES* TO DETERMINE ANATOMICAL DISABILITY WAS CONSTITUTIONALLY DISCRIMINATORY.

Petitioners argued at length and on multiple grounds before the Tennessee Supreme Court "that using the AMA Guides to determine anatomical disability ... results in

unlawful discrimination." *Lynch v. City of Jellico*, Slip. Op. at 12, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *31. The trial court correctly found that workers whose maladies are not addressed by the *American Medical Association Guides to the Evaluation of Permanent Impairment* ("*AMA Guides*"), will be afforded no protection or be provided with any award for disability. This conclusion flows from the undoubted fact that outside of the *AMA Guides* there is no other accepted method of measuring impairment; nor had the Tennessee legislature provided any reasonable alternative.

The Tennessee Supreme Court dealt with this issue primarily by invoking its earlier decision in *Brown v. Campbell County Board of Education, supra*. It did so even though the Workers Compensation Reform Act of 2004 had eliminated the use of the Manual for Orthopaedic Surgeons for evaluating permanent physical impairment without providing for a reasonable alternative. Indeed, the court agreed that the *AMA Guides* are less than ideal for the purpose intended. *Lynch v. City of Jellico*, Slip. Op. at 12, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *32. Still, the court felt that the *AMA Guides*, notwithstanding their faults, were both usable and useful without at the same time being marred by constitutional infirmities. *Lynch v. City of Jellico*, Slip. Op. at 12, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *32.

The fact is that the Court failed to meet petitioners' argument on its own terms. For example, the Court, while agreeing that the *AMA Guides* do not cover all situations and injuries, stated that do nevertheless provide for an alternative means for "setting an award of vocational disability." *Lynch v. City of Jellico*, Slip. Op. at 13, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *33. As the Tennessee Supreme Court stated:

> In addition, we observed in Brown that it "is simply not true" that workers whose injuries are not covered by the AMA Guides receive no benefits. Id. We explained in Brown that the medical impairment rating of workers whose medical problems are not recognized by the AMA Guides may be determined by any appropriate method used and accepted by the medical community. *Id.* The same holds true today. Tenn. Code Ann. § 50-6-204(d)(3)(A) ("To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a [medical expert] shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 *or in cases not covered by the AMA Guides an impairment rating by any appropriate method used and accepted by the medical community*.") (emphasis added)

Lynch v. City of Jellico, Slip. Op. at 13, ___ S.W.3d at ___, 2006 Tenn. Lexis 759 at *32 to *33.

The problem with this assumption, however, is that is simply not workable in fact. Petitioners presented evidence at trial that there are injuries for which this supposed alternate route of reaching a rating simply does not exist. The court both noted and rejected this argument in the following way:

> The plaintiffs filed the affidavits of two medical experts who opined that there is no method used and accepted by the medical community to rate injuries not covered by the AMA Guides. We note, however, that the AMA Guides themselves indicate that in situations where impairment ratings are not provided, physicians are to use their clinical judgment based upon the physician's experience, training, and skill, in arriving

> at an impairment rating. See AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, § 1.5 (Gunnar B.J. Andersson & Linda Cocchiarella, eds., 5th ed. 2000).

Lynch v. City of Jellico, Slip. Op. at 13 n.10, ___ S.W.3d at ___ n.10, 2006 Tenn. Lexis 759 at *33 n. 10. The Court will note, however, that while it noted petitioners' argument, it did not dispose of it. Petitioners' evidence established that no such impairment rating outside of the *AMA Guides* was possible. The Tennessee Supreme Court in response noted that the *AMA Guides* asserted that such a method did exist. The problem is that the Tennessee Supreme Court simply noted both views but did not choose between them.

One might argue that the decision to reverse the trial court on this point is a strong signal that the Court accepted the *AMA Guides* over petitioners' expert affidavits. Nonetheless, the Court's lack of clarity, if not its silence on the point, indicates that it evaded rather than resolved the issue. This entails in turn that petitioners' equal protection and due process concerns remain essentially unaddressed. This failure on the part of the Tennessee Supreme Court entails in turn that this Court should grant review so as to settle the matter that the Tennessee Supreme Court unaccountably left unresolved on the table.

CONCLUSION

Therefore, and for all the foregoing reasons, petitioners Jerry Wayne Lynch and David A. Lozano respectfully request that this Court issue a Writ of Certiorari to the Supreme Court of Tennessee

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
June 8, 2006 Session

No. E2006-00208-SC-R3-CV
No. E2006-00207-SC-R3-CV

[Filed October 10, 2006]

JERRY WAYNE LYNCH	)
	)
v.	)
	)
CITY OF JELLICO, ET AL.	)
	)
AND	)
	)
DAVID A. LOZANO	)
	)
v.	)
	)
LINCOLN MEMORIAL UNIVERSITY, ET AL.	)
	)

Direct Appeal from the Chancery Court Campbell County
No. 05-100 Billy Joe White, Chancellor

Direct Appeal from the Chancery Court Claiborne County
No. 150-63 Billy Joe White, Chancellor

ORDER

Plaintiffs/Appellees, David A. Lozano and Jerry Wayne Lynch, by and through counsel, have filed a petition to rehear the opinion of this Court filed on August 30, 2006. Upon due consideration, the petition is DENIED.

PER CURIAM

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
JUNE 8, 2006 Session

No. E2006-00208-SC-R3-CV
No. E2006-00207-SC-R3-CV

[Filed August 30, 2006]

JERRY WAYNE LYNCH	)
	)
v.	)
	)
CITY OF JELLICO, ET AL.	)
	)
AND	)
	)
DAVID A. LOZANO	)
	)
v.	)
	)
LINCOLN MEMORIAL UNIVERSITY, ET AL.	)
	)

Chancery Court for Campbell County
No. 05-100 and Chancery Court for
Claiborne County No. 150-63

JUDGMENT

These cases were heard upon the records on appeal from the Chancery Courts for Claiborne and Campbell Counties, applications for permission to appeal having heretofore been granted, briefs and argument of counsel; and upon consideration thereof, this Court is of the opinion that the trial courts erred in concluding that the benefit review conference requirement of the Workers' Compensation Reform Act of 2004 ("the Act") is unconstitutional. We further conclude that the trial courts also erred in concluding that the method specified in the Act for determining permanent partial disability benefits is unconstitutional.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged that the trial courts' judgments in these cases are reversed.

The costs of these appeals shall be paid by the plaintiffs, David A. Lozano and Jerry Wayne Lynch, each as to his own case, for which execution may issue if necessary.

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
June 8, 2006 Session

No. E2006-00208-SC-R3-CV
No. E2006-00207-SC-R3-CV

[Filed August 30, 2006]

JERRY WAYNE LYNCH	)
	)
v.	)
	)
CITY OF JELLICO, ET AL.	)
	)
AND	)
	)
DAVID A. LOZANO	)
	)
v.	)
	)
LINCOLN MEMORIAL UNIVERSITY, ET AL.	)
	)

Direct Appeal from the Chancery Court Campbell County
No. 05-100 Billy Joe White, Chancellor

Direct Appeal from the Chancery Court Claiborne County
No. 150-63 Billy Joe White, Chancellor

JUDGES: CORNELIA A. CLARK, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., E. RILEY ANDERSON, ADOLPHO A. BIRCH, JR., and JANICE M. HOLDER, JJ., joined.

In these consolidated workers' compensation appeals, we are asked to decide the constitutionality of various provisions of the Workers' Compensation Reform Act of 2004. Specifically at issue is whether the benefit review conference requirement embodied in Tennessee Code Annotated sections 50-6-203(a) (2005), 50-6-225(a)(1) (2005), and 50-6-239(b) (2005), violates the due process protections of the Tennessee or United States Constitutions, the separation of powers doctrine in article II, sections 1 and 2 of Tennessee's Constitution, or the open courts doctrine found in article I, section 17, of the Tennessee Constitution. Additionally, we are asked to decide whether the method used to determine permanent partial disability benefits, namely the multiplier provisions of Tennessee Code Annotated section 50-6-241(d)(1)(A) (2005) used in conjunction with the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"), violates equal protection; due process; the Tennessee Human Rights Act, Tennessee Code Annotated section 4-21-101 (2005); and the Tennessee Handicap Act, Tennessee Code Annotated section 8-50-103(a) (2002). The trial judge determined that each of these provisions of the Workers' Compensation Reform Act of 2004-the benefit review conference, the multiplier, and use of the AMA Guides-is unconstitutional. After carefully considering the record and relevant authority, we conclude that the trial judge erred. Accordingly, the trial court's judgments are reversed.

Tenn. Code Ann. § 50-6-225(e); Judgments of the Trial Court Reversed; Remanded

CORNELIA A. CLARK, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., E. RILEY ANDERSON, ADOLPHO A. BIRCH, JR., and JANICE M. HOLDER, JJ., joined.

Paul G. Summers, Attorney General and Reporter, and Juan G. Villaseñor, Assistant Attorney General, for the Appellants, State of Tennessee and Attorney General Paul G. Summers.

Jennifer M. Caywood and Chris Myatt, Knoxville, Tennessee, for the Appellants, Lincoln Memorial University and St. Paul Travelers Insurance Company.

John T. Batson, Jr., and Hanson R. Tipton, Knoxville, Tennessee, for the Appellant City of Jellico.

David H. Dunaway, LaFollette, Tennessee, for the Appellees David A. Lozano and Jerry Wayne Lynch.

Andrew C. Clarke and R. Sadler Bailey, Memphis, Tennessee, for the Amicus Curiae, Tennessee Trial Lawyers Association.

OPINION

Factual and Procedural Background

The facts in these workers' compensation cases are few and, for purposes of this appeal, undisputed. On May 25, 2005, Jerry Wayne Lynch filed a workers' compensation action in the Campbell County Chancery Court against his employer, the City of Jellico, as well as the Second Injury Fund, the State of Tennessee, and Paul G. Summers in his

capacity as Attorney General. The suit alleged that on February 21, 2005, the plaintiff discovered that he had work-related bilateral carpal tunnel syndrome for which he was entitled to workers' compensation benefits. The complaint also alleged that on March 29, 2005, the plaintiff was in the back of a dump truck removing a salt spreader at work when he fell out of the truck, injuring his neck and back.

On September 9, 2005, David A. Lozano filed a workers' compensation action in the Claiborne County Chancery Court against his employer, Lincoln Memorial University, and the employer's insurer, St. Paul Travelers Insurance Company. Also named as a defendant was Paul G. Summers in his capacity as Attorney General. The complaint alleged that the plaintiff was entitled to workers' compensation benefits for injuries suffered in a fall on the employer's premises on February 11, 2005. According to the complaint, the fall resulted in injuries to the plaintiff's arms, back, and legs.

Although the plaintiffs filed separate actions in separate courts, they both challenge the constitutionality of key provisions of the Workers' Compensation Reform Act of 2004, namely, the mandatory benefit review conference, the cap on benefits for permanent partial disability, and use of the AMA Guides to determine anatomical impairment. Specifically, the plaintiffs claim that the mandatory benefit review conference found in Tennessee Code Annotated sections 50-6-203(a), 50-6-225(a)(1), and 50-6-239(b), violates the due process protections of the Tennessee and United States Constitutions, the separation of powers doctrine in article II, sections 1 and 2 of Tennessee's Constitution, and the open courts doctrine embodied in article I, section 17, of the Tennessee Constitution, Supreme Court Rule 11(VII)(b), and Tennessee Code Annotated section 50-6-225. The plaintiffs also challenge the method used to determine

permanent partial disability benefits, specifically the multiplier provisions of Tennessee Code Annotated section 50-6-241(d)(1)(A) and use of the AMA Guides to determine anatomical impairment. The plaintiffs claim that Tennessee Code Annotated section 50-6-241(d)(1)(A), which imposes a cap on permanent partial benefits of 1.5 times the employee's anatomical impairment rating if the employee returns to work at a greater or equal wage, used in conjunction with the AMA Guides to determine anatomical impairment, violates equal protection; due process; the Tennessee Human Rights Act ("THRA"), Tennessee Code Annotated section 4-21-101 (2005); and the Tennessee Handicap Act ("THA"), Tennessee Code Annotated section 8-50-103(a) (2002).

The plaintiffs each filed a motion for summary judgment on the constitutional questions. The State of Tennessee filed a motion for judgment on the pleadings in each case, contending that (1) the challenged statutes were constitutional, (2) the plaintiffs' claims should be dismissed because they failed to participate in the mandatory benefit review conference, and (3) the plaintiffs lacked standing. The employers in each case filed a motion to dismiss based on the plaintiffs' failure to exhaust the benefit review conference process.

The trial judge in both cases, Chancellor Billy Joe White, held that the mandatory benefit review conference violated the separation of powers doctrine in article II, sections 1 and 2, of Tennessee's Constitution; procedural and substantive due process under the state and federal constitutions; and the open courts doctrine embodied in article I, section 17, of

Tennessee's Constitution, Supreme Court Rule 11(VII)(b),[1] and Tennessee Code Annotated section 50-6-225. The trial judge also found that the multiplier provisions contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) violated equal protection and due process. Finally, the trial court struck down sections 50-6-241(a)(1), -241(b), and -241(c)-which require use of the AMA Guides to determine anatomical impairment-as violating equal protection, due process, the THRA, and the THA. Pursuant to Tennessee Rule of Civil Procedure 54.02, the trial court's order in each case was declared to be final "only as to the [plaintiffs'] constitutional claims adjudicated herein." Thus, the compensability of the plaintiffs' workers' compensation claims and the extent of their vocational disability, if any, have yet to be determined.

The defendant employers, along with the State of Tennessee, appealed the trial court's decision in each case. This Court subsequently consolidated and transferred the cases to the full Court prior to a hearing before the Special Workers' Compensation Appeals Panel. For the reasons explained below, we reverse the trial court's judgment in both cases.

Standard of Review

This appeal involves questions of law only. Therefore, the standard of review is de novo without any presumption of

---

[1] The trial court's orders cite to Tennessee Supreme Court Rule 11(VII)(c), which sets out the procedure for appointing substitute trial judges. The trial court apparently meant to cite Rule 11(VII)(b), which states that "it is the policy of the Tennessee Judicial Department that all courts of this state shall be open and available for the transaction of business. . . ."

correctness given to the legal conclusions of the trial court. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005). Further, it is well-established in Tennessee that when considering the constitutionality of a statute, we start with a strong presumption that acts passed by the legislature are constitutional. *See Osborn v. Marr*, 127 S.W.3d 737, 740-41 (Tenn. 2004). Indeed, "we must indulge every presumption and resolve every doubt in favor of constitutionality." *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). Therefore, notwithstanding the trial judge's findings in the present case, we must begin our inquiry with the presumption that the statutes in question pass constitutional muster.

Likewise, it is well recognized that a facial challenge to a statute, such as that involved here, is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). Thus, the plaintiffs in this appeal have a heavy legal burden in challenging the constitutionality of the statutes in question.

Analysis

Introduction

The purpose of the Tennessee Workers' Compensation Law, which was originally enacted in 1919, is to relieve society of the burden of providing compensation to injured workers and to put that burden on the industry employing the worker. *See Scott v. Nashville Bridge Co.*, 143 Tenn. 86, 223 S.W. 844, 849 (Tenn. 1920). Since its inception, Tennessee's

workers' compensation system has been challenged a number of times without success. *See Vogel*, 937 S.W.2d 856; *Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d 407 (Tenn. 1995); *Kelley v. 3-M Co.*, 639 S.W.2d 437 (Tenn. 1982); *Nichols v. Benco Plastics, Inc.*, 225 Tenn. 334, 469 S.W.2d 135 (Tenn. 1971); *Mitchell v. Usilton*, 146 Tenn. 419, 242 S.W. 648 (Tenn. 1922); *Vantrease v. Smith*, 143 Tenn. 254, 227 S.W. 1023 (Tenn. 1921); *Scott*, 143 Tenn. 86, 223 S.W. 844.

In addition to surviving a number of constitutional challenges throughout its history, the Workers' Compensation Law has been modified numerous times, most recently in 2004 with the passage of the Workers' Compensation Reform Act, 2004 Tenn. Pub. Acts 962. In passing the Act, the legislature recognized that "significant cost savings will result" to employers, and that "[i]t is in the best interest of the citizens of Tennessee that such cost savings be passed to the entities that have paid faithfully workers' compensation premiums in order to ensure the economic well-being of their employees." 2004 Tenn. Pub. Acts 962, § 42(a). Thus, the stated purpose of the Act was to make the workers' compensation system less costly for employers.

I. Benefit Review Conference

As part of the Workers' Compensation Reform Act of 2004, the legislature decided that parties having a workers' compensation dispute over injuries occurring after January 1, 2005, must exhaust an administrative process, called a benefit review conference, before filing suit. *See* Tenn. Code Ann. § 50-6-203(a) ("[n]o claim for compensation under [the] Workers' Compensation Law . . . shall be filed with a court . . . until the parties have exhausted the benefit review conference process. . . ."); Tenn. Code Ann. § 50-6-

225(a)(1) ("in case of a dispute over or failure to agree upon compensation under the Workers' Compensation Law. . . the parties shall first submit the dispute to the benefit review conference process. . . ."); Tenn. Code Ann. § 50-6-239(b) ("The parties to a dispute shall attend and participate in a benefit review conference. . . as a condition precedent to filing a complaint with a court. . . ."). The benefit review conference is a nonadversarial, informal dispute resolution proceeding designed to mediate and resolve workers' compensation matters. *See* Tenn. Code Ann. § 50-6-102(4) (2005). Only when the parties cannot reach an agreement at the benefit review conference may they proceed to court.

A. Due Process

The plaintiffs argue that, as mandatory mediation, the benefit review conference denies injured workers access to the courts and therefore violates both procedural and substantive due process. The trial judge agreed, concluding that the benefit review conference "deprive[s] injured workers . . . of [their] rights to a trial by judge or an individual otherwise learned in the law."

The defendants respond that the benefit review conference process does not violate due process because injured employees can still present their workers' compensation claims to a court-they just have to participate in the benefit review process first. Thus, the defendants maintain that the trial court erred in ruling that the benefit review conference deprives injured workers of their right to be heard by a judge. The defendants also assert that the State has legitimate interests in requiring workers to exhaust the benefit review process prior to filing suit. These interests include protecting the rights of injured workers in facilitating a prompt resolution of claims without litigation, reducing workers'

compensation insurance premiums for employers, and maintaining a competitive job market for the state as a whole.

We begin our analysis of this issue by noting that the due process clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. We have previously held that article I, section 8 of the Tennessee Constitution, which provides that "no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land," is synonymous with the due process provisions of the federal constitution. *Willis v. Tenn. Dep't of Corr.*, 113 S.W.3d 706, 711 n.4 (Tenn. 2003).

Due process under the state and federal constitutions encompasses both procedural and substantive protections. The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982); *Manning v. City of Lebanon*, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003). In contrast, substantive due process limits oppressive government action, such as deprivations of fundamental rights like the right to marry, have children, make child rearing decisions, determine child custody, and maintain bodily integrity. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). Substantive due process claims may be divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions by the government which are "arbitrary, or

conscience shocking in a constitutional sense." *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997). In short, substantive due process bars certain government action regardless of the fairness of the procedures used to implement them. *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Applying these principles to this case, we are persuaded that the plaintiffs have failed to establish that the mandatory benefit review conference is inconsistent with basic notions of fairness or fair process. The benefit review requirement does not preclude injured workers from presenting their workers' compensation claims to a court. The law is clear that "[i]n the event the parties are unable to reach an agreement at the benefit review conference . . . either party may file a civil action . . . in the circuit or chancery court." Tenn. Code Ann. § 50-6-225(a)(2).

Because injured workers are free to file suit and have their rights judicially determined upon exhausting the benefit review process, they are not, as argued by the plaintiffs, deprived of their right to be heard by a judge. In fact, the parties agree that the legislature could, if it desired, remove workers' compensation cases from the court system and make the determination of benefits administrative in nature. Most jurisdictions have done just that. *See* Larson, Workers' Compensation Law, § 124.01 (2005) ("The initial handling of claims, and perhaps the first review, are administrative in all but a few states. The whole idea is to get away from the cumbersome [litigation process], and to reach a right decision by the shortest and quickest possible route.").

Thus, we conclude that the trial judge erred in holding that the mandatory benefit review process embodied in sections 50-6-203(a), 50-6-225(a)(1), and 50-6-239(b), violates procedural due process.

Nor does the mandatory benefit review conference violate substantive due process. While it is certainly important to ensure that workers obtain redress for industrial accidents, the workers' compensation scheme does not stand on the same footing as those fundamental rights identified by state and federal courts "implicit in the concept of ordered liberty" so as to raise substantive due process concerns. *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *Vogel*, 937 S.W.2d at 858 ("workers' compensation benefits are not deemed to be fundamental rights"). Indeed, the plaintiffs have not shown the deprivation of *any* particular constitutional right, much less a fundamental one. In addition, we are not persuaded that requiring parties to participate in a benefit review conference prior to seeking redress in the courts is an "arbitrary, or conscience shocking" exercise of the legislature's authority to craft the workers' compensation system. *See Collins*, 503 U.S. at 128. Thus, we conclude that the trial judge erred in holding that the mandatory benefit review conference violates substantive due process.

B. Separation of Powers

The trial judge also concluded that the benefit review conference violates the separation of powers doctrine because a workers' compensation specialist, not a judge, conducts the

benefit review conference.[2] In urging us to uphold the trial court's finding on this issue, the plaintiffs assert that the benefit review conference "represents a legislative hijacking" of the workers' compensation system away from the judicial branch and in favor of the executive branch.[3] We disagree.

The separation of powers doctrine is contained in article II, sections 1 and 2, of Tennessee's Constitution:

> **Sec. 1. Division of powers.** - The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.
>
> **Sec. 2. Limitation of powers.** - No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

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[2] The benefit review conference is conducted by a workers' compensation specialist, who is an employee of the commissioner of labor and workforce development. Tenn. Code Ann. § 50-6-236(a) (2005). The legislature has determined that workers' compensation specialists "shall be trained in the principles and procedures of dispute mediation" and receive training "on the department's workers' compensation system, the Tennessee workers' compensation statutes and caselaw, and the rules and regulations of the division of workers' compensation." Tenn. Code Ann. § 50-6-236(f), (m) (2005). In addition, workers' compensation specialists must meet annual continuing education requirements. *See* Tenn. Code Ann. § 50-6-236(m) (2005).

[3] The plaintiffs also argue that workers' compensation specialists should be licensed attorneys as a way of safeguarding the rights of workers. To the extent there is any merit to this argument, it should be addressed to the legislature.

Although the separation of powers doctrine "is a fundamental principle of American constitutional government, . . . it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government. There is necessarily a certain amount of overlapping." *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975). Accordingly, "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government." *Id.*

Mindful of these principles, we note that the benefit review conference does not substitute for a workers' compensation action. Again, the law clearly provides that "[i]n the event the parties are unable to reach an agreement at the benefit review conference . . . either party may file a civil action . . . in the circuit or chancery court." Tenn. Code Ann. § 50-6-225(a)(2). The courts will ultimately adjudicate a worker's claim if the case is not settled at the benefit review conference. Thus, the benefit review process does not frustrate the adjudicative function of the judicial branch. Accordingly, the trial court erred in finding a separation of powers violation.

C. Open Courts Doctrine

In addition to finding that the benefit review conference violates due process and separation of powers, the trial court ruled in both cases that the benefit review process violates the open courts doctrine embodied in article I, section 17, of the Tennessee Constitution, Supreme Court Rule 11(VII)(b), and

Tennessee Code Annotated section 50-6-225.[4] The trial court's rulings were premised upon the court's belief that injured workers were being denied the right to have their claims heard in court.

The open courts provision of Tennessee's Constitution, article I, section 17, states that "all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." Supreme Court Rule 11(VII)(b) reflects this same principle, providing that "it is the policy of the Tennessee Judicial Department that all courts of this state shall be open and available for the transaction of business. . . ."

In arguing that the trial judge's finding on this issue should be upheld, the plaintiffs assert that they seek "nothing more than to keep the courthouse doors open to Tennessee workers so as to ensure access to justice for all." However, as already noted, injured workers can have their rights judicially determined notwithstanding the benefit review conference. Thus, we find that the benefit review conference does not run afoul of the open courts doctrine embodied in article I, section 17, of the Tennessee Constitution. Nor does the benefit review requirement violate Supreme Court Rule 11(VII)(b) or Tennessee Code Annotated section 50-6-225.

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[4] Tennessee Code Annotated section 50-6-225 is a lengthy statute that covers many topics. Neither the trial court nor the plaintiffs cite to a particular part of the statute to support the notion that the benefit review conference violates the open courts doctrine as purportedly reflected in the statute.

II. The Multiplier Provisions

In addition to imposing a mandatory benefit review conference, the Workers' Compensation Reform Act of 2004 modified the maximum multiplier used to determine permanent partial disability benefits. Specifically, for injuries occurring on or after July 1, 2004, the maximum permanent partial disability benefit an employee may receive is 1.5 times his or her medical impairment rating if the worker returns to work with the preinjury employer at an equal or higher wage. Tenn. Code Ann. § 50-6-241(d)(1)(A).[5] If the employee does not return to work with the preinjury employer at an equal or higher wage, the worker may receive up to six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A). An employee's medical impairment rating is determined by using the AMA Guides or, if the employee's injury is not covered by the AMA Guides, by any appropriate method used and accepted by the medical community. Tenn. Code Ann. § 50-6-204(d)(3)(A).

The trial court ruled in both cases that the multiplier contained in section 50-6-241(d)(1)(A) violates due process and equal protection, reasoning that section 50-6-241(d)(1)(A) results in an "arbitrary reduction of disability benefits." The trial judge also concluded that section 50-6-241(d)(1)(A) "unreasonably classifies injured workers whose injuries are recognized [by the AMA Guides] against those workers whose injuries are not so recognized."

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[5] The multiplier was previously 2.5 times the worker's medical impairment rating.

A. Standing

The defendants contend that the plaintiffs lack standing to challenge the constitutionality of section 50-6-241(d)(1)(A) because they have yet to have their benefits capped by section 50-6-241(d)(1)(A).[6] The trial court did not expressly address this issue, but did so implicitly by resolving the merits of the constitutional claims in favor of the plaintiffs.

To establish standing, a plaintiff must show three elements: (1) a distinct and palpable injury, as opposed to a conjectural or hypothetical injury; (2) a causal connection between the claimed injury and the challenged conduct; and (3) the alleged injury is capable of being redressed by a favorable decision of the courts. *See Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute. *Id.* at 619. In other words, standing "precludes courts from adjudicating 'an action at the insistence of one whose rights have not been invaded or infringed.'" *Id.* at 619-20 (quoting *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001)). Without the limitation of standing, courts would be called upon to decide abstract questions unrelated to the litigants before them.

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[6] The State makes a distinct argument that the plaintiffs improperly sued the State of Tennessee because of sovereign immunity. The State has not raised sovereign immunity as a defense until now and, therefore, has waived the issue. *See In re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn. 2001) (issues not raised and decided in the trial court will not be reviewed in the Supreme Court). The State concedes, however, that the Attorney General is a necessary party in any case involving the constitutionality of a statute.

Guided by these principles, we are persuaded that the plaintiffs have standing to challenge the constitutionality of section 50-6-241(d)(1)(A). According to the plaintiffs' complaints, they each suffered compensable work-related injuries on specific dates while working for specific employers. Taking these allegations as true-as we must at this point in the litigation-the plaintiffs' benefits are subject to the multiplier provisions of section 50-6-241(d)(1)(A) and, for that matter, the benefit review conference provisions in sections 50-6-203(a), -225(a)(1), and -239(b). Thus, we are not confronted with a conjectural or hypothetical dispute. Also, the claims being advanced by the plaintiffs are capable of being redressed by a favorable decision of the courts. Accordingly, these particular plaintiffs are entitled to an adjudication of the particular claims asserted.

B. Equal Protection

Having determined that the plaintiffs have standing to challenge section 50-6-241(d)(1)(A), we turn to the merits of their equal protection claim. Both the United States and Tennessee Constitutions guarantee to citizens the equal protection of the laws. The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Our state constitution provides an equal protection guarantee in article XI, section 8, which states that the

> Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie [immunities]

> or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

We have consistently held that these two constitutional provisions confer the same protections. *Brown*, 915 S.W.2d at 413.

In analyzing equal protection challenges in the workers' compensation context, the appropriate standard is the rational basis test. *Id.* Under the rational basis test, our inquiry is whether the classification system in the statute has a reasonable relationship to a legitimate state interest. "Unless the individual challenging the statute can establish that the differences are unreasonable, the statute must be upheld." *Id.* at 414. If the classification is naturally and reasonably related to that which it seeks to accomplish it has passed the rational basis test and has met constitutional standards. Our task, then, is to determine whether section 50-6-241(d)(1)(A) reasonably relates to legitimate state purposes.

This Court has previously determined that using maximum multipliers in conjunction with the AMA Guides as contemplated by section 50-6-241 is rationally based and does not violate equal protection. In rejecting a previous challenge to the multipliers on equal protection grounds, we stated:

> The multipliers substantially reduce the possibility of similarly situated workers with like injuries and anatomical disability ratings receiving vastly different awards. Reasonable uniformity in statutory awards is a legitimate state interest.

> Additionally, the caps provide employees, employers, and their insurers with a measure of predictability since all awards have defined outer limits. Predictability in the law is obviously a desirable and legitimate legislative objective, one that serves the interests of the parties, bench, and bar. In addition to providing a degree of uniformity and predictability, the caps serve the state's interest in keeping workers' compensation insurance premiums from escalating to the point that industry cannot afford them. . . .

Brown, 915 S.W.2d at 414-15. Also important to our analysis in *Brown* was the fact that the cap on benefits is not absolute-courts have the discretion to exceed them in cases involving substantial vocational obstacles. *Id.* at 415. Accordingly, the Court in *Brown* held that the impairment rating model contemplated by section 50-6-241 did not violate equal protection.

Nothing has changed since *Brown* was decided in 1995, except that the multiplier has been reduced from 2.5 to 1.5 as part of the Reform Act of 2004. The multiplier still reduces the possibility of similarly situated workers with like injuries and anatomical disability ratings receiving vastly different awards. The multiplier still provides employees, employers, and their insurers with a measure of predictability since awards of benefits have defined outer limits. Predictability in the law is still a desirable and legitimate legislative objective, one that serves the interests of the parties, bench, and bar. Moreover, the multiplier still serves the state's interest in keeping workers' compensation insurance premiums from escalating to the point that industry cannot afford them. Finally, trial courts still have the discretion to exceed the multipliers in appropriate cases. *See* Tenn. Code Ann. § 50-6-

242.[7] Thus, the rationale adopted by the Court in *Brown* in upholding the method of determining permanent partial benefits is just as valid today as it was when *Brown* was decided. Accordingly, the trial court in this case erred in finding that section 50-6-241(d)(1)(A) violates equal protection.

C. Due Process

The trial judge determined that section 50-6-241(d)(1)(A) violates substantive due process because the statute results in

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[7] "For those injuries that occur on or after July 1, 2004, and notwithstanding any provision of this chapter to the contrary and in appropriate cases where the employee is eligible to receive the maximum permanent partial disability award under § 50-6-241(d)(1)(B) or (d)(2), the employee may receive disability benefits not to exceed the appropriate maximum number of weeks as set forth in § 50-6-207 for the type of injury sustained by the employee. In such cases, the court or the workers' compensation specialist shall make specific documented findings, supported by clear and convincing evidence, that as of the date of the award or settlement, at least three (3) of the following facts concerning the employee are true:
(1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
(2) The employee is fifty-five (55) years of age or older;
(3) The employee has no reasonably transferable job skills from prior vocational background and training; and
(4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition."

an arbitrary reduction of benefits by capping benefits.[8] We disagree.

As discussed above, substantive due process limits oppressive government action involving deprivations of a particular constitutional guarantee or government action that is "arbitrary, or conscience shocking in a constitutional sense." *Collins*, 503 U.S. at 128; *Valot*, 107 F.3d at 1228. Here, the plaintiffs have not shown that the multipliers in section 50-6-241 have deprived them of any particular constitutional guarantee. Nor are we persuaded that the legislature's decision to use the multiplier model is arbitrary or conscience shocking in a constitutional sense. Thus, the trial judge erred in concluding that section 50-6-241(d)(1)(A) violates due process.[9]

III. AMA Guides

The trial judge also concluded that using the AMA Guides to determine anatomical disability as required by sections 50-6-241(a)(1), (b)-(c), and 50-6-204(d)(3), results in unlawful discrimination. The trial court reasoned that an individual with medical conditions not addressed by the AMA Guides would be precluded from recovering workers' compensation benefits. The trial judge also determined that the AMA Guides should not be the sole factor used to measure vocational disability. Therefore, the trial judge found that

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[8] Section 50-6-241(d)(1)(A) does not implicate procedural due process concerns.

[9] The amicus takes issue with the fact that employees who sustain injuries before July 1, 2004, are treated differently than those who suffer injuries on or after July 1, 2004. In our view, this disparate treatment does not violate equal protection or due process.

using the AMA Guides is "arbitrary, capricious, irrational, and serves no legitimate purpose other than favoring employers." As such, the trial court concluded in both cases that the use of the AMA Guides violates due process, equal protection, the THRA, and the THA.

A. Equal Protection and Due Process

Like the plaintiffs in this case, the plaintiffs in *Brown* argued that using the AMA Guides to determine anatomical impairment violated equal protection because (1) numerical percentage ratings are not provided for certain medical conditions, (2) factors other than a physician's interpretation of anatomical impairment are not considered in determining vocational disability and, (3) the AMA Guides themselves caution against their exclusive use in fashioning awards of vocational disability. *Brown*, 915 S.W.2d at 415. We acknowledged in *Brown* that the AMA Guides do not provide ratings for some impairments and that the AMA Guides caution against their exclusive use in determining vocational impairment. *Id.* We concluded, however, that the "reasonable and legitimate state interests applicable to the multipliers-uniformity, fairness and predictability-are equally applicable to the use of the AMA Guides. . . . If the AMA Guides were not used, medical opinions would be more subjective, and perhaps, arbitrary." *Id.* at 415-16. For this reason, most states use the AMA Guides in workers' compensation cases. *Id.* at 416.

In addition, we observed in *Brown* that it "is simply not true" that workers whose injuries are not covered by the AMA Guides receive no benefits. *Id.* We explained in *Brown* that the medical impairment rating of workers whose medical problems are not recognized by the AMA Guides may be determined by any appropriate method used and accepted by

the medical community. *Id.* The same holds true today. Tenn. Code Ann. § 50-6-204(d)(3)(A) ("To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a [medical expert] shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 *or in cases not covered by the AMA Guides an impairment rating by any appropriate method used and accepted by the medical community.*") (emphasis added).[10]

Finally, the Court in *Brown* noted that the AMA Guides are not the sole determining factor in setting an award of vocational disability. Specifically, section 50-6-241 required then-and requires now-consideration of all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work in the employee's disabled condition. Accordingly, the Court in *Brown* rejected the argument that use of the AMA Guides violates equal protection.

For the same reasons discussed in *Brown*, we reiterate today that use of the AMA Guides to determine anatomical impairment does not violate equal protection. Further, we

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[10] The plaintiffs filed the affidavits of two medical experts who opined that there is no method used and accepted by the medical community to rate injuries not covered by the AMA Guides. We note, however, that the AMA Guides themselves indicate that in situations where impairment ratings are not provided, physicians are to use their clinical judgment based upon the physician's experience, training, and skill, in arriving at an impairment rating. *See* AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, § 1.5 (Gunnar B.J. Andersson & Linda Cocchiarella, eds., 5th ed. 2000).

hold that use of the AMA Guides does not violate due process.

B. THRA and THA

The trial court held in both cases that the multiplier in section 50-6-241(d)(1)(A) used in conjunction with the AMA Guides discriminates against employees in violation of the THRA and the THA. The plaintiffs argue that the trial court's findings on this issue should be upheld because use of the AMA Guides to determine anatomical impairment, along with the lowering of the multiplier from 2.5 to 1.5, "is unconscionable and otherwise drafted to favor employers." We disagree that the multiplier in section 50-6-241(d)(1)(A) used in conjunction with the AMA Guides violates the THRA and the THA.

The purpose of the THRA is to:

> (1) Provide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967, as amended;
> (2) Assure that Tennessee has appropriate legislation prohibiting discrimination in employment, public accommodations and housing . . . .;
> (3) Safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin in connection with employment and public accommodations, and because of race, color, creed, religion, sex or national origin in connection with housing;
> (4) Protect their interest in personal dignity and freedom from humiliation;

> (5) Make available to the state their full productive capacity in employment;
> (6) Secure the state against domestic strife and unrest that would menace its democratic institutions;
> (7) Preserve the public safety, health and general welfare; and
> (8) Further the interest, rights, opportunities and privileges of individuals within the state.

Tenn. Code Ann. § 4-21-101. The intent of the THRA is to provide for execution within Tennessee of the policies embodied in the federal civil rights statutes. *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 31 (Tenn. 1996). Accordingly, an analysis of claims under the THRA is the same as under Title VII of the Federal Civil Rights Act. *Id.*

The THA, found in section 8-50-103, states in pertinent part:

> There shall be no discrimination in the hiring, firing and other terms and conditions of employment of the state of Tennessee or any department, agency, institution or political subdivision of the state, or of any private employer, against any applicant for employment based solely upon any physical, mental or visual handicap of the applicant, unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.

Tenn. Code Ann. § 8-50-103(a).

Mindful of these statutes, we note that all employers whose employees suffer work-related injuries on or after July

1, 2004, whom the employer rehires at an equal or greater wage must pay a maximum permanent partial disability award of 1.5 times the employee's medical impairment rating as determined by the AMA Guides, unless the injury is not covered by the AMA Guides. If the injury is not covered by the AMA Guides, the impairment rating may be determined by any appropriate method used and accepted by the medical community. Tenn. Code Ann. § 50-6-204(d)(3)(A). Thus, section 50-6-241(d)(1)(A) results in similarly situated employees being treated the same, comporting with the principles of equity and fairness espoused by the civil rights laws. Accordingly, we conclude that section 50-6-241(d)(1)(A) used in conjunction with the AMA Guides does not result in prohibited discrimination under the THRA or the THA.

CONCLUSION

For the reasons stated above, we hold that the benefit review conference requirement embodied in Tennessee Code Annotated sections 50-6-203(a), -225(a)(1), and -239(b), does not violate the due process protections of the Tennessee or United States Constitutions, the separation of powers doctrine in article II, sections 1 and 2 of Tennessee's Constitution, or the open courts doctrine found in article I, section 17, of the Tennessee Constitution. Nor does the benefit review conference violate Supreme Court Rule 11(VII)(b) or Tennessee Code Annotated section 50-6-225. We also hold that the method used to determine permanent partial disability benefits, specifically the multiplier provisions of Tennessee Code Annotated section 50-6-241(d)(1)(A) and use of the AMA Guides to determine anatomical impairment, does not violate equal protection, due process, the THRA, or the THA. Accordingly, the judgment of the trial court is reversed in each case. These cases are remanded to the trial courts for

further proceedings consistent with this opinion. Costs are taxed to the plaintiffs, David A. Lozano and Jerry Wayne Lynch, and their sureties, for which execution may issue if necessary.

/s/
CORNELIA A. CLARK, JUSTICE

APPENDIX D

IN THE CHANCERY COURT
FOR CAMPBELL COUNTY, TENNESSEE
AT JACKSBORO

CIVIL ACTION NO. 05-100

[Filed January 20, 2006]

JERRY WAYNE LYNCH Plaintiff,	)
v.	)
CITY OF JELLICO, SUE ANN HEAD, DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, SECOND INJURY FUND, STATE OF TENNESSEE, and PAUL G. SUMMERS, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE, Defendants.	)

ORDER

This matter came to be heard on the 11th day of January, 2006, before the Honorable Billy Joe White, Chancellor of the Chancery Court for Campbell County, Tennessee on a Motion to Alter or Amend, which was filed by the Attorney General on behalf of himself and the State of Tennessee pursuant to Rule 59.04 of the *Tennessee Rules of Civil Procedure* to alter or amend the Court's previous Orders that were made on or about December 6, 2005, and to allow the Attorney General an opportunity to be hear. The Court, after hearing argument of counsel and considering the record as a whole, did find that the Attorney General and State of Tennessee's Motion to Alter or Amend and/or otherwise fro the Court to vacate its previous Order was well taken, and it is hereby **ORDERED** that the Court's previous Orders on the hearing of December 6, 2005, are vacated.

This matter came further to be heard on the Renewed Motion to Dismiss filed by the Defendant, City of Jellico, and an Amended Motion for Judgment on the Pleadings filed by the Attorney General and the State of Tennessee, at which time the Court, after hearing argument of all counsel and considering the record as a whole, did find that the Plaintiff's Motion for Leave to Amend was well taken and it is hereby **ORDERED** that the Plaintiff's Complaint was amended to include allegations that the Tennessee Workers' Compensation Reform Act of 2004 also violates the Fifth and Fourteenth Amendments to the United States Constitution, in addition to Article One, Section 8 of the Tennessee Constitution.

This matter came further to be heard on the Attorney General's Motion to Strike his Motion for Judgment on the Pleadings and to substitute it with an Amended Motion for

Judgment on the Pleadings. The Court found that this Motion to be well taken, and it is so **ORDERED**.

This matter cam further to be heard on the Renewed Motion to Dismiss filed by the Defendant, City of Jellico, and an Amended Motion for Judgment on the Pleadings filed by the Attorney General and the State of Tennessee, at which time the Court, after hearing argument of all counsel and considering the record as a whole, did find that the Motion to Dismiss filed by the Defendant, City of Jellico, and the Motion for Judgment on the Pleadings filed by the Defendants, Attorney General and State of Tennessee, were not well taken, at which time the Court announced to all parties that the Court was reaffirming its findings previously made on December 6, 2005, that Public Chapter 962, Section 14, and more specifically T.C.A. Section 50-6-203(a) that requires that no claim for compensation under the Tennessee Workers' Compensation Law shall be filed with a court having jurisdiction to hear workers' compensation matters as provided in Tennessee Code Annotated Section 50-6-225 until the parties have exhausted a benefit review conference process provided by the Division of Workers' Compensation was unconstitutional, illegal and void, and at which time the Court announced that the Court had reviewed the pleadings of the parties and the Briefs which had been filed by all parties on this issue, and the Court, after hearing argument of counsel, again finds the mandatory arbitration provisions and/or benefit review conference process, as otherwise required by T.C.A. Section 50-6-203(a), T.C.A. Section 50-6-225(a)(1) and T.C.A. Section 50-6-239(b) requiring mandatory mediation of an injured worker's claim are unlawful and unfairly and unconscionably deprive injured workers, including the Plaintiff, of his rights to a trial by judge or an individual otherwise learned in the law and the enactment of these provisions is further a violation of the

Separation of Powers Doctrine as set out in the Tennessee Constitution, Article Two, Sections 1-2 of the Tennessee Constitution. The Court further finds that the mandatory mediation required by a benefit review conference is further in violation of Tennessee Supreme Court Rule 11(VII)(c)(3) and T.C.A. Section 50-6-225. That the mandatory mediation or arbitration process, as otherwise required by the Tennessee Worker's Compensation Reform Act of 2004 constitutes a deprivation of life, liberty, property and due process as otherwise guaranteed to the Plaintiff by Article One, Section 8 of the Tennessee Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The Court further finds that requiring a mandatory mediation and otherwise requiring a workers' compensation specialist to hear an injured worker's claim instead of a judge is a denial of due process and is otherwise an invasion of the Separation of Powers Doctrine under the Tennessee Constitution.

It is therefore, **ORDERED, ADJUDGED** AND **DECREED** that T.C. A. Section 50-6-203(a), T.C.A. Section 50-6-225(a)(1) and T.C.A. Section 50-6-239(b) are declared unfair, unconscionable, illegal, unconstitutional and void.

This matter came further to be heard on Plaintiff's Motion for Partial Summary Judgment, the Plaintiff's Motion to Submit Additional Affidavit of Dr. William Kennedy in support of the Plaintiff's Motion for Partial Summary Judgment, and the Plaintiff's Motion to Shorten Time for Response to Plaintiff's Motion for Partial Summary Judgment, at which time the parties announced and agreed that the time for response to the Plaintiff's Motion for Partial Summary Judgment could be shortened, that the Affidavit of Dr. William Kennedy could be considered, and that the

Attorney General and State of Tennessee's Motion to Strike Plaintiff's Motion for Partial Summary Judgment would be denied, and the Court, after hearing argument of counsel and considering the record as a whole, did find that the Plaintiff's Motion for Partial Summary Judgment was well taken, and the Court, after reviewing the Affidavits of Dr. William Kennedy and Dr. C. M. Salekin, hearing argument of counsel , and considering the record as a whole, found that the Plaintiff's Motion for Partial Summary Judgment should be granted, and the Court makes the following findings:

1. That T.C.A. Section 50-6-241(d) provides for injuries occurring on or after July 1, 2004, and in cases in which an injured employee is eligible to receive any permanent partial disability benefits, either for a body as a whole or a scheduled member, except scheduled member injuries specified in T.C.A. Section 50-6-207(3)(A)(ii)(a) - (l) - (m) - (q) and (r), when the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability that an employee may receive under this provision is one and one half (1 ½) times the medical impairment rating as otherwise required in T.C.A. § 50-6-204(d)(3).

2. That the *AMA Guides* should have nothing to do with the ability of an individual to work.

3. That the enactment of a one and a half times (1 ½) multiplier by the Tennessee General Assembly unfairly discriminates between workers whose problems are recognized by the *AMA Guides* and those whose problems are not, such as chronic pain syndrome, mental trauma, and psychogenic pain.

4. That all injuries are not adequately addressed by the *AMA Guidelines*

5. That the Plaintiff, Jerry Wayne Lynch, suffered injuries on February 21, 2005 and March 29, 205 which are not adequately addressed by *The AMA Guidelines*.

6. That for injuries that occur to Tennessee workers after July 1, 2004, the Tennessee General Assembly has reduced the amount of disability and individual may receive if he returns to the same or equal pay to one and a half (1 ½) times the medical impairment rating pursuant to the provisions of *The American Medical Association Guides to the Evaluation of Permanent Impairment*, most recent edition.

7. That the reduction by the Tennessee General Assembly in the measurement of disability from a two and a half (2 ½) to a one and a half (1 ½) multiplier is such that a worker with an injury occurring prior to July 1, 2004, is entitled to receive workers' compensation disability benefits of forty percent (40%) greater than a fellow worker or his counterpart who may have suffered the same injury after July 1, 2004.

8. That disability and impairment are different concepts.

9. That the *AMA Guides* should not be used as a direct estimate of an injured worker's disability.

10. That failing to allow disability to be awarded on a condition which is not addressed by the *AMA Guides* for individuals like the Plaintiff, Jerry Wayne Lynch, who would otherwise suffer a real profuse characteristic of events surrounding a major life activity, yet awarding disability to others who suffer from a condition recognized by the *Guides*

which might not otherwise substantially limit a major life activity is discriminatory.

11. That it should be a physician's responsibility to determine if an impairment results in a functional limitation.

12. That according to Section 1.2b of page 9 of *The AMA Guides*, "The *Guides* are not intended to be used for direct estimates of work disability. The impairment percentages derived according to the *Guides'* criteria do not measure work disability. Therefore, it is inappropriate to use the *Guides'* criteria or ratings to make direct estimates of work disability."

13. That the statutory requirements of placing a one and a half (1 ½) times multiplier cap on disability benefits is an unreasonable use of *The AMA Guides*.

14. That the methods of imposing caps on disability is not an appropriate use of *The Guides*.

15. That given the range, evolution, and discovery of new medical conditions, *The Guides* cannot provide an impairment rating for all impairments.

16. That *The AMA Guides* themselves at page four make it clear that "impairment ratings were designed to reflect functional limitations and not disability."

17. That the medical judgment used to determine the original impairment percentages by a physician could not account for the diversity or complexity of work, but could account for daily activities common to most people. That work is not included in the clinical judgment for impairment percentages for several reasons:

(a) work involves many simple and complex activities;
(b) work is highly individualized, making generalizations inaccurate;

(c) the impairment percentages are unchanged for stable conditions, but work and occupations change; and

(d) impairments interact with such other factors as the worker's age, education and prior work experience to determine the extent of the work disability. For example, an individual who receives a 30% whole person impairment due to pericardial disease is considered from a clinical standpoint to have a 30% reduction in general functioning, as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there by be no decline in their work ability, although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% impairment rating due to pericardial heart disease may be completely unable to do his or her regular job, and thus may have a 100% work disability. As a result, impairment ratings are not intended for use as direct determinants of work disability."

18. That the Tennessee Worker's Compensation Reform Act of 2004 contravenes the recommended use of *The AMA Guides* and attempts to make a direct financial award or direct estimate of disability based solely upon *The AMA Guidelines*.

19. That based upon the expert testimony that is before the Court, there is not appropriate or other acceptable method of measurement of impairment in the medical community nor is there any other acceptable method of measurement for orthopedic injuries than those methods utilized in the *AMA Guides to the Evaluation of Permanent Impairme*

20. That because there is no other method of measurement of impairment acceptable tot he medical community, other than through the use of the *AMA Guidelines*, and because the Tennessee Workers' Compensation Reform Act of 2004 has not provided a reasonable rating alternative for medical conditions not included in *The Guides*, the new Reform Act, and specifically T.C.A. Section 50-6-241 with it multiplier scheme is held to be an impermissible use of the *AMA Guides*.

21. That there are injuries suffered by the Plaintiff, Jerry Wayne Lynch, which are not adequately addressed by *The AMA Guides*.

22. That by the enactment of the Tennessee Worker's Compensation Reform of 2004, the Tennessee General Assembly has created classes of handicapped individuals, those whose injuries may be addressed by *The AMA Guides* and others who must search out some sort of cobbled together ad hoc system as a measure of impairment, which would otherwise be used and accepted by the medical community to cover an individual's injuries when all injuries are not adequately addressed by *The AMA Guides*. That since there is no other medically accepted method of measuring impairment than *The AMA Guides*, and because the legislature has not provided a reasonable rating alternative for medical conditions not included in *The Guides*, individuals whose conditions are not covered by *The Guides* are discriminated

against and are otherwise deprived of workers' compensation benefits.

23. That T.C.A. Section 8-50-103(a) provides, "There shall be no discrimination in hiring, firing, and other terms and conditions of employment in the State of Tennessee or any department, agency, institution, or political subdivision of the state or of any private employer against any applicant for employment based solely upon any physical, mental, or visual handicap of the applicant unless such handicap, to some degree, prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. For some major activities, such as work, a physician, by use of *The Guides* may provide an opinion on the medical impairment and limitations suffered by an individual, yet in those situations which are not addressed by *The AMA Guides*, an individual such as Jerry Wayne Lynch, who has suffered abnormalities not otherwise addressed by *The AMA Guides* can find themselves in situations in which they are afforded absolutely no protection or otherwise provided no award for disability, even though a condition which they suffer would otherwise substantially limit their major life activities. That by failing to allow disability to be awarded on a condition which is not addressed by *The AMA Guides*, it results in discrimination against those individuals who would otherwise suffer a real perceived characteristic substantially limiting major life activity yet awarding disability to others who may suffer from a condition recognized by *The Guides*, and which might not otherwise substantially limit a major life activity creates classes of handicapped individuals, contrary and in violation of the Tennessee Human Rights Act and the Tennessee Handicapped Statute as a matter of public policy.

24. That the Tennessee Workers' Compensation Reform Act of 2004 and more specifically T.C.A. Section 50-6-241, by reducing workers' compensation awards to a one and a half (1 ½) multiplier scheme through the use of *The AMA Guides* results in an adverse employment action, as contemplated by the Tennessee Handicap Act and is a material and adverse change in the terms and condition of an injured worker's employment.

25. That the application of the discriminatory multiplier of one and a half (1 ½) by use of *The AMA Guides* constitutes a "materially adverse change" in terms and conditions of employment of injured workers.

26. That the 2004 Tennessee Workers' Compensation Act, and more specifically T.C.A. Section 50-6-241, is in violation of the Tennessee Human Rights Act and the Tennessee Handicap Act.

27. The 2004 Tennessee Workers' Compensation Reform Act produces arbitrary disability determinations because, unlike previous versions of the Tennessee Worker's Compensation Act, it does not permit any discretion or any other formula for measurement of disability because there are no other appropriate methods utilized and accepted by the medical community, other than through utilization of *The AMA Guides*.

28. That the 2004 Tennessee Workers' Compensation Reform Act discriminates against those whose disabilities cannot be rated by *The Guides* and makes a forty percent (40%) reduction in disability for injuries to the body as a whole for individuals suffering from the same injury as their counterparts after July 1, 2004.

29. That the Tennessee Workers' Compensation Reform Act is arbitrary, capricious, irrational, and serves no legitimate purpose other than favoring employers with a discriminatory device utilized to reduce disability benefits to which workers who return to work at the same or equal pay are deprived of disability benefits.

30. That where *The AMA Guides* are an inadequate reference, the Tennessee Workers' Compensation Statutes do not allow for reference to any other publication nor is there any other publication known to be accepted in the medical community by which an alternative measure of disability could be made.

31. That in its 2004 Amendment of T.C.A. Section 50-6-241, the Tennessee General Assembly eliminated the use of *The Manual for Orthopedic Surgeons* for evaluating permanent physical impairment.

32. That there is no other appropriate method used and accepted by the medical community for measurement of impairment, other than *The AMA Guides*.

33. That under the 2004 Tennessee Workers' Compensation Reform Act, the enactment of the one and a half (1 ½) times multiplier unfairly discriminates between workers whose medical problems are recognized by *The AMA Guides* and those whose problems are not.

34. That the creation of a one and half (1 ½) times multiplier by the Tennessee Workers' Compensation Reform Act of 2004 is irrational, capricious, unfairly discriminatory, without justification, and therefore unconstitutional.

35. The Court further finds and declares that T.C.A. Section 50-6-241(a)(1) is illegal and unconstitutional because the statute violates equal protection of the Fourteenth Amendment of the United States Constitution in that it provides workers who return to the same employment with less disability than those workers who did not return to the same employment.

36. The Court further finds and declares T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonably classify injured workers whose injuries are recognized by *The AMA Guides* and those whose injuries are not so recognized, as in this case. The Court finds that it is arbitrary, capricious illegal, and unconstitutional for multipliers through the utilization of *The AMA Guides* to be intended to be a maximum limits for the measure of disability. The Court therefore declares T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional inasmuch as these statutes place a maximum limit on the measure of disability and the Court finds these statutes to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonable classify injured workers whose injuries are recognized by *The AMA Guides* against those whose injuries are not so recognized.

37. The Court further finds and declares T.C.A. Section 50-6-241(c) to be arbitrary, capricious, irrational, and unconstitutional and in violation of the Equal Protection Clause of the Fourteenth Amendment and the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution because this statute required that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) are maximum limits. The Court further finds that the impairment ratings in *The AMA Guides*

are an impermissible use of a measurement of disability for the measurement of an inability to work. That in a typical work environment, a worker with a slight impairment might be (given the nature of his occupation) completely unable to continue in his trade, while another worker might suffer a more serious injury and yet (because of the nature of his or her occupation) be able to continue working. That incorporation of *The AMA Guides* into the statutory scheme of the Tennessee Worker's Compensation Act, in spite of these findings, is therefore arbitrary, capricious, and irrational by our Tennessee General Assembly.

38. The Court further finds and declares T.C.A. Section 50-6-241(d)(1)(A) to be arbitrary, irrational, illegal, and unconstitutional because this statute results in an arbitrary, capricious, and irrational reduction of disability benefits for injured workers with scheduled member injuries, and this statute also unreasonably classifies injured workers whose injuries are recognized by *The AMA Guides* against those workers whose injuries are not so recognized.

It is therefore **ORDERED, ADJUDGED AND DECREED** that T.C.A. Section 50-6-241(a)(1), T.C.A. Section 50-6-241(b), T.C.A. Section 50-6-241(c) and T.C.A. Section 50-6-241(d)(1)(A) are hereby declared arbitrary, capricious, illegal, unconstitutional, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article One, Section 8 of the Tennessee Constitution, and are void.

The Court finds that there is no just reason for delay to enter a Final Judgment as to the Plaintiff's unconstitutional claims against the Attorney General and the State of Tennessee. Therefore, pursuant to Rule 54.02 of the *Tennessee Rules of Civil Procedure*, the Court hereby enters

a Final Judgment only as to the Plaintiff's constitutional claims adjudicated herein.

ENTERED this 20 day of January, 2006.

/s/ _____
CHANCELLOR

APPENDIX E

IN THE CHANCERY COURT
FOR CLAIBORNE COUNTY, TENNESSEE
AT TAZEWELL

CIVIL ACTION NO. 15,063

[Filed January 20, 2006]

DAVID A. LOZANO,	)
Plaintiff,	)
	)
v.	)
	)
LINCOLN MEMORIAL UNIVERSITY,	)
ST. PAUL/TRAVELERS INSURANCE	)
COMPANY, and PAUL G. SUMMERS,	)
ATTORNEY GENERAL FOR	)
THE STATE OF TENNESSEE,	)
Defendants.	)
	)

ORDER

This matter came to be heard on the 11th day of January, 2006, before the Honorable Billy Joe White, Chancellor of the Chancery Court for Claiborne County, Tennessee, on a Motion to Dismiss filed by the Defendants, Lincoln Memorial University and St. Paul Travelers Insurance Company, and on Motion for Partial Judgment on the Pleadings filed by the

Defendants, State of Tennessee and Attorney General, Paul G. Summers, at which time the Court, after hearing argument of all counsel and considering the record as a whole, did find that the Motion to Dismiss filed by the Defendants, Lincoln Memorial University and St. Paul Travelers Insurance Company, and the Motion for Partial Judgment on the Pleadings filed by the Defendants, State of Tennessee and Attorney General, Paul G. Summers, were not well taken, and at which time the Court announced to all parties that the Court was re-affirming its findings previously made in a similar case of *Lynch v. City of Jellico, et al.*, No. 05-100, Campbell County Chancery Court, that Public Chapter 962, Section 14, and more specifically T.C.A. Section 50-6-203(a) that requires that no claim for compensation under the Tennessee Workers' Compensation Law shall be filed with a court having jurisdiction to hear workers' compensation matters as provided in Tennessee Code Annotated Section 50-6-225 until the parties have exhausted a benefit review conference process provided by the Division of Workers' Compensation was unconstitutional, illegal and void, and at which time the Court announced that the Court had reviewed the pleadings of the parties and the Briefs which had been filed by all parties on this issue, and the Court, after hearing argument of counsel, again finds the mandatory arbitration provision and/or benefit review conference process, as otherwise required by T.C.A. Section 50-6-203(a), T.C.A. Section 50-6-225(k)(1) and T.C.A. Section 50-6-239(b) requiring mandatory mediation of an injured worker's claim are unlawful and unfairly and unconscionably deprive injured workers, including the Plaintiff, of his rights to a trial by judge or an individual otherwise learned in the law and that the enactment of these provisions is further a violation of the Separation of Powers Doctrine as set out in the Tennessee Constitution, Article Two, Sections 1-2 of the Tennessee Constitution. The Court further finds that the mandatory

mediation required by a benefit review conference is further in violation of Tennessee Supreme Court Rule 11 (VII)(c)(3) and T.C.A. Section 50-6-225. That the mandatory mediation or arbitration process, as otherwise required by the Tennessee Workers' Compensation Reform Act of 2004 constitutes a deprivation of life, liberty, property and due process as otherwise guaranteed to the Plaintiff by Article One, Section 8 of the Tennessee Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The Court further finds that requiring a mandatory mediation and otherwise requiring a workers' compensation specialist to hear an injured worker's claim instead of a judge is a denial of due process and is otherwise an invasion of the Separation of Powers Doctrine under the Tennessee Constitution.

It is therefore **ORDERED, ADJUDGED AND DECREED** that the Motion to Dismiss filed by the Defendants, Lincoln Memorial University and St. Paul Travelers Insurance Company, shall be denied. The Motion For Partial Judgment on the Pleadings filed by the Defendants, State of Tennessee and Attorney General, Paul G. Summers, shall be denied, and it is further **ORDERED, ADJUDGED AND DECREED** that T.C.A. Section 50-6-203(a), T.C.A. Section 50-6-225(a)(1) and T.C.A. Section 50-6-239(b) are declared unfair, unconscionable, illegal, unconstitutional, and void.

This matter came further to be heard on the Plaintiff's Motion for Partial Summary Judgment and the Plaintiff's Motion to Shorten Time for Response to Plaintiff's Motion for Partial Summary Judgment, at which time the parties announced and agreed that the time for response to the Plaintiff's Motion for Partial Summary Judgment should be

shortened and that the Attorney General and State of Tennessee's Motion to Strike Plaintiff's Motion for Partial Summary Judgment would be withdrawn, and the Court, after hearing argument of counsel and considering the record as a whole, did find that the Plaintiff's Motion for Partial Summary Judgment was well taken, and the Court, after reviewing the Affidavit of Dr. C. M. Salekin, hearing argument of counsel, and considering the record as a whole, found that the Plaintiff's Motion for Partial Summary Judgment should be granted, and the Court makes the following findings:

1. That T.C.A. Section 50-6-241(d) provides for injuries occurring on or after July 1, 2004, and in cases in which an injured employee is eligible to receive any permanent partial disability benefits, either for a body as a whole or a scheduled member, except scheduled member injuries specified in T.C.A. Section 50-6-207(3)(A)(ii)(a) - (l) - (m) - (q) and (r), when the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability that an employee may receive under this provision is one and one half (1 ½) times the medical impairment rating as otherwise required in T.C.A. § 50-6-204(d)(3).

2. That the *AMA Guides* should have nothing to do with the ability of an individual to work.

3. That the enactment of a one and a half times (1 ½) multiplier by the Tennessee General Assembly unfairly discriminates between workers whose problems are recognized by the *AMA Guides* and those whose problems are not, such as chronic pain syndrome, mental trauma, and psychogenic pain.

4. That all injuries are not adequately addressed by the *AMA Guidelines*.

5. That the Plaintiff, David A. Lozano, suffered injuries on February 11, 2005, which are not adequately addressed by *The AMA Guidelines*.

6. That for injuries that occur to Tennessee workers after July 1, 2004, the Tennessee General Assembly has reduced the amount of disability and individual may receive if he returns to the same or equal pay to one and a half (1 ½) times the medical impairment rating pursuant to the provisions of *The American Medical Association Guides to the Evaluation of Permanent Impairment*, most recent edition.

7. That the reduction by the Tennessee General Assembly in the measurement of disability from a two and a half (2 ½) to a one and a half (1 ½) multiplier is such that a worker with an injury occurring prior to July 1, 2004, is entitled to receive workers' compensation disability benefits of forty percent (40%) greater than a fellow worker or his counterpart who may have suffered the same injury after July 1, 2004.

8. That disability and impairment are different concepts.

9. That the *AMA Guides* should not be used as a direct estimate of an injured worker's disability.

10. That failing to allow disability to be awarded on a condition which is not addressed by the *AMA Guides* for individuals like the Plaintiff, David A. Lozano, who would otherwise suffer a real profuse characteristic of events surrounding a major life activity, yet awarding disability to others who suffer from a condition recognized by the *Guides*

which might not otherwise substantially limit a major life activity is discriminatory.

11. That it should be a physician's responsibility to determine if an impairment results in a functional limitation.

12. That according to Section 1.2b of page 9 of *The AMA Guides*, "The *Guides* are not intended to be used for direct estimates of work disability. The impairment percentages derived according to the *Guides'* criteria do not measure work disability. Therefore, it is inappropriate to use the *Guides'* criteria or ratings to make direct estimates of work disability."

13. That the statutory requirements of placing a one and a half (1 ½) times multiplier cap on disability benefits is an unreasonable use of *The AMA Guides*.

14. That the methods of imposing caps on disability is not an appropriate use of *The Guides*.

15. That given the range, evolution, and discovery of new medical conditions, *The Guides* cannot provide an impairment rating for all impairments.

16. That *The AMA Guides* themselves at page four make it clear that "impairment ratings were designed to reflect functional limitations and not disability."

17. That the medical judgment used to determine the original impairment percentages by a physician could not account for the diversity or complexity of work, but could account for daily activities common to most people. That work is not included in the clinical judgment for impairment percentages for several reasons:

(a) work involves many simple and complex activities;

(b) work is highly individualized, making generalizations inaccurate;

(c) the impairment percentages are unchanged for stable conditions, but work and occupations change; and

(d) impairments interact with such other factors as the worker's age, education and prior work experience to determine the extent of the work disability. For example, an individual who receives a 30% whole person impairment due to pericardial disease is considered from a clinical standpoint to have a 30% reduction in general functioning, as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there by be no decline in their work ability, although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% impairment rating due to pericardial heart disease may be completely unable to do his or her regular job, and thus may have a 100% work disability. As a result, impairment ratings are not intended for use as direct determinants of work disability."

18. That the Tennessee Worker's Compensation Reform Act of 2004 contravenes the recommended use of *The AMA Guides* and attempts to make a direct financial award or direct estimate of disability based solely upon *The AMA Guidelines*.

19. That based upon the expert testimony that is before the Court, there is not appropriate or other acceptable method of measurement of impairment in the medical community nor is there any other acceptable method of measurement for orthopedic injuries than those methods utilized in the *AMA Guides to the Evaluation of Permanent Impairment*.

20. That because there is no other method of measurement of impairment acceptable tot he medical community, other than through the use of the *AMA Guidelines*, and because the Tennessee Workers' Compensation Reform Act of 2004 has not provided a reasonable rating alternative for medical conditions not included in *The Guides*, the new Reform Act, and specifically T.C.A. Section 50-6-241 with it multiplier scheme is held to be an impermissible use of the *AMA Guides*.

21. That there are injuries suffered by the Plaintiff, Jerry Wayne Lynch, which are not adequately addressed by *The AMA Guides*.

22. That by the enactment of the Tennessee Worker's Compensation Reform of 2004, the Tennessee General Assembly has created classes of handicapped individuals, those whose injuries may be addressed by *The AMA Guides* and others who must search out some sort of cobbled together ad hoc system as a measure of impairment, which would otherwise be used and accepted by the medical community to cover an individual's injuries when all injuries are not adequately addressed by *The AMA Guides*. That since there is no other medically accepted method of measuring impairment than *The AMA Guides*, and because the legislature has not provided a reasonable rating alternative for medical conditions not included in *The Guides*, individuals whose conditions are not covered by *The Guides* are discriminated

against and are otherwise deprived of workers' compensation benefits.

23. That T.C.A. Section 8-50-103(a) provides, "There shall be no discrimination in hiring, firing, and other terms and conditions of employment in the State of Tennessee or any department, agency, institution, or political subdivision of the state or of any private employer against any applicant for employment based solely upon any physical, mental, or visual handicap of the applicant unless such handicap, to some degree, prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. For some major activities, such as work, a physician, by use of *The Guides* may provide an opinion on the medical impairment and limitations suffered by an individual, yet in those situations which are not addressed by *The AMA Guides*, an individual such as Jerry Wayne Lynch, who has suffered abnormalities not otherwise addressed by *The AMA Guides* can find themselves in situations in which they are afforded absolutely no protection or otherwise provided no award for disability, even though a condition which they suffer would otherwise substantially limit their major life activities. That by failing to allow disability to be awarded on a condition which is not addressed by *The AMA Guides*, it results in discrimination against those individuals who would otherwise suffer a real perceived characteristic substantially limiting major life activity yet awarding disability to others who may suffer from a condition recognized by *The Guides*, and which might not otherwise substantially limit a major life activity creates classes of handicapped individuals, contrary and in violation of the Tennessee Human Rights Act and the Tennessee Handicapped Statute as a matter of public policy.

24. That the Tennessee Workers' Compensation Reform Act of 2004 and more specifically T.C.A. Section 50-6-241, by reducing workers' compensation awards to a one and a half (1 ½) multiplier scheme through the use of *The AMA Guides* results in an adverse employment action, as contemplated by the Tennessee Handicap Act and is a material and adverse change in the terms and condition of an injured worker's employment.

25. That the application of the discriminatory multiplier of one and a half (1 ½) by use of *The AMA Guides* constitutes a "materially adverse change" in terms and conditions of employment of injured workers.

26. That the 2004 Tennessee Workers' Compensation Act, and more specifically T.C.A. Section 50-6-241, is in violation of the Tennessee Human Rights Act and the Tennessee Handicap Act.

27. The 2004 Tennessee Workers' Compensation Reform Act produces arbitrary disability determinations because, unlike previous versions of the Tennessee Worker's Compensation Act, it does not permit any discretion or any other formula for measurement of disability because there are no other appropriate methods utilized and accepted by the medical community, other than through utilization of *The AMA Guides*.

28. That the 2004 Tennessee Workers' Compensation Reform Act discriminates against those whose disabilities cannot be rated by *The Guides* and makes a forty percent (40%) reduction in disability for injuries to the body as a whole for individuals suffering from the same injury as their counterparts after July 1, 2004.

29. That the Tennessee Workers' Compensation Reform Act is arbitrary, capricious, irrational, and serves no legitimate purpose other than favoring employers with a discriminatory device utilized to reduce disability benefits to which workers who return to work at the same or equal pay are deprived of disability benefits.

30. That where *The AMA Guides* are an inadequate reference, the Tennessee Workers' Compensation Statutes do not allow for reference to any other publication nor is there any other publication known to be accepted in the medical community by which an alternative measureof disability could be made.

31. That in its 2004 Amendment of T.C.A. Section 50-6-241, the Tennessee General Assembly eliminated the use of *The Maual for Orthopedic Surgeons* for evaluating permanent physical impairment.

32. That there is no other appropriate method used and accepted by the medical community for measurement of impairment, other than *The AMA Guides*.

33. That under the 2004 Tennessee Workers' Compensation Reform Act, the enactment of the one and a half (1 ½) times multiplier unfairly discriminates between workers whose medical problems are recognized by *The AMA Guides* and those whose problems are not.

34. That the creation of a one and half (1 ½) times multiplier by the Tennessee Workers' Compensation Reform Act of 2004 is irrational, capricious, unfairly discriminatory, without justification, and therefore unconstitutional.

35. The Court further finds and declares that T.C.A. Section 50-6-241(a)(1) is illegal and unconstitutional because the statute violates equal protection of the Fourteenth Amendment of the United States Constitution in that it provides workers who return to the same employment with less disability than those workers who did not return to the same employment.

36. The Court further finds and declares T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonably classify injured workers whose injuries are recognized by *The AMA Guides* and those whose injuries are not so recognized, as in this case. The Court finds that it is arbitrary, capricious illegal, and unconstitutional for multipliers through the utilization of *The AMA Guides* to be intended to be a maximum limits for the measure of disability. The Court therefore declares T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional inasmuch as these statutes place a maximum limit on the measure of disability and the Court finds these statutes to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonable classify injured workers whose injuries are recognized by *The AMA Guides* against those whose injuries are not so recognized.

37. The Court further finds and declares T.C.A. Section 50-6-241(c) to be arbitrary, capricious, irrational, and unconstitutional and in violation of the Equal Protection Clause of the Fourteenth Amendment and the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution because this statute required that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) are maximum limits. The Court further finds that the impairment ratings in *The AMA Guides*

are an impermissible use of a measurement of disability for the measurement of an inability to work. That in a typical work environment, a worker with a slight impairment might be (given the nature of his occupation) completely unable to continue in his trade, while another worker might suffer a more serious injury and yet (because of the nature of his or her occupation) be able to continue working. That incorporation of *The AMA Guides* into the statutory scheme of the Tennessee Worker's Compensation Act, in spite of these findings, is therefore arbitrary, capricious, and irrational by our Tennessee General Assembly.

38. The Court further finds and declares T.C.A. Section 50-6-241(d)(1)(A) to be arbitrary, irrational, illegal, and unconstitutional because this statute results in an arbitrary, capricious, and irrational reduction of disability benefits for injured workers with scheduled member injuries, and this statute also unreasonably classifies injured workers whose injuries are recognized by *The AMA Guides* against those workers whose injuries are not so recognized.

It is therefore **ORDERED, ADJUDGED AND DECREED** that T.C.A. Section 50-6-241(a)(1), T.C.A. Section 50-6-241(b), T.C.A. Section 50-6-241(c) and T.C.A. Section 50-6-241(d)(1)(A) are hereby declared arbitrary, capricious, illegal, unconstitutional, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article One, Section 8 of the Tennessee Constitution, and are void.

The Court finds that there is no just reason for delay to enter a Final Judgment as to the Plaintiff's unconstitutional claims against the Attorney General and the State of Tennessee. Therefore, pursuant to Rule 54.02 of the *Tennessee Rules of Civil Procedure*, the Court hereby enters

a Final Judgment only as to the Plaintiff's constitutional claims adjudicated herein.

ENTERED this 20 day of January, 2006.

/s/ _____
CHANCELLOR

APPENDIX F

TENNESSEE CODE ANNOTATED

Title 50 Employer And Employee
Chapter 6 Workers' Compensation
Part 2 -Claims and Payment of Compensation

Tenn. Code Ann. § 50-6-203. Limitation of time, claims and actions.

(a) No claim for compensation under Workers' Compensation Law, compiled in this chapter, shall be filed with a court having jurisdiction to hear workers' compensation matters, as provided in § 50-6-225, until the parties have exhausted the benefit review conference process provided by the division of workers' compensation. Notwithstanding the provisions of this section, if the parties have mutually agreed to a compromise and settlement of a claim for workers' compensation, the parties shall not be required to exhaust the benefit review conference process before filing a claim and submitting the compromise and settlement to the appropriate court for approval pursuant to § 50-6-206(a) or to the commissioner of labor and workforce development or the commissioner's designee pursuant to § 50-6-206(c). If the settlement is not approved, the parties shall then exhaust the benefit review conference process.

Tenn. Code Ann. § 50-6-225. Submission of claim to court upon failure to agree on compensation - Special workers' compensation appeals panel - Impasse.

(a)(1) Notwithstanding any provisions of this chapter to the contrary, in case of a dispute over or failure to agree upon compensation under the Workers' Compensation Law, compiled in this chapter, between the employer and employee or the dependent or dependents of the employee, the parties shall first submit the dispute to the benefit review conference process provided by the division of workers' compensation.

Tenn. Code Ann. § 50-6-239. Motion for benefit review conference - Motion for expedited adjudication - Specialists.

(b) The parties to a dispute shall attend and participate in a benefit review conference that addresses all issues related to a final resolution of the matter as a condition precedent to filing a complaint with a court of competent jurisdiction.

Tenn. Code Ann. § 50-6-241. Maximum permanent partial disability award for causes arising on or after August 1, 1992 - Reconsideration of industrial disability issue - Awards for claims arising on or before July 1, 2004.

(d)(1)(A) For injuries occurring on or after July 1, 2004, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for schedule member injuries, except schedule member injuries specified in § 50-6-207(3)(A)(ii)(a)-(l), (n), (q), and (r), and the pre-injury employer returns the employee

to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive is one and one-half (1 1/2) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3). In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition.